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In the Supreme Court of the United States

OCTOBER TERM, 1975

KURT A. WUNDERLICH and EDWARD A. PETERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 75-406

KURT J. WUNNICKE and EDWARD J. PIETERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's oral opinion on the motion to suppress is reproduced in part in the Appendix, *infra*. The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1975, and a timely petition for rehearing was denied on August 21, 1975. The petition for a

writ of certiorari was filed on September 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the informant who gave the information upon which an affidavit for a search warrant was based should have been produced for examination by defense counsel at a suppression hearing.

2. Whether an incriminating statement made by petitioner Wunnicke while being held in custody in a jail should have been suppressed as the fruit of an unlawful stop of a vehicle.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioners were convicted of manufacturing and possessing with the intent to distribute "3,4-methylenedioxy amphetamine" (MDA), a Schedule I amphetamine,[1] in violation of 21 U.S.C. 841(a)(1). Petitioner Wunnicke was sentenced to four years' imprisonment, subject to the immediate parole eligibility provision of 18 U.S.C. 4208(a)(2), to be followed by a two-year term of special parole; petitioner Pieters was sentenced under 18 U.S.C. 5010(b), the Federal Youth Corrections Act, to a maximum of six years' supervision, including a maximum of four years' impris-

[1] See 21 U.S.C. 812(c), Schedule I(c)(1).

onment, as provided by 18 U.S.C. 5017(c). The court of appeals affirmed (Pet. App. A).

1. The evidence showed that petitioners established and operated a laboratory for the manufacture of MDA, a controlled substance, and that they manufactured and possessed with intent to distribute about 15 pounds of MDA, which has a wholesale value of about $4,000 a pound (Tr. 10-13, 16, 50-58, 104, 155-158, 187-188).[2] The evidence was obtained from two separate investigations, one by Denver police and the other by Boulder County detectives attached to a federal DEA (Drug Enforcement Administration) task force. The two efforts converged on January 17, 1974, when the Denver police were accompanied by members of the task force in the execution of a State warrant to search petitioners' laboratory (Mot. Tr. 62-63, 85-86).

a. In January 1974, two Boulder County detectives attached to the DEA task force were continuing their five-month-long investigation into petitioners' involvement in the manufacture of MDA (Mot. Tr. 12, 14-15, 18, 67). By the 17th of January, both suspects had dropped out of sight: Wunnicke had not been seen since October 1973, and Pieters since December 1973 (Mot. Tr. 18, 19). On the morning of the 17th, while driving to work, the detectives hap-

[2] "Tr." refers to the trial transcript, which constitutes volumes I and II of the record on appeal; "Mot. Tr." refers to the transcript of the hearings on the motions to suppress, which constitute volumes III to VI of record on appeal. "R." refers to other portions of the record on appeal.

pened upon a vehicle, being driven by Pieters, in which Wunnicke was a passenger in the front seat (Mot. Tr. 12-13, 18-19, 39). The detectives sounded their horn and signaled Pieters to stop the vehicle; they wanted to ascertain Wunnicke's address and to verify Pieters' address (Mot. Tr. 19-20).

While examining Pieters' driver's license and registration card, one of the detectives noticed on the dashboard an envelope on which was printed the name and address of the laboratory. Pieters apparently became nervous at the detective's interest in the envelope and asked whether the detective was "with Federal Narcotics." When the detective replied affirmatively, Pieters said, "[b]efore you find it, I have a gun" (Mot. Tr. 21-22). Pieters opened his brief case, and as the detective retrieved the gun, he saw a bottle containing about 30 white tablets, which looked like methamphetamine, a controlled substance (Mot. Tr. 22-24).[3]

Petitioners were thereupon arrested and taken to the task force office, where they were booked and given *Miranda* warnings (Mot. Tr. 24-29). They were then driven to the Denver police station, where they were formally booked for local firearms and drug charges (Mot. Tr. 29-30). The detectives then went to the laboratory in order to investigate further but there was no one there to admit them (Mot. Tr. 54, 61). Thereafter, one of the detectives attempted to gather sufficient information to support

[3] The pills turned out to be only caffeine, a substance which is not controlled (Mot. Tr. 44).

a search warrant, but he ceased his efforts when he learned that the Denver police had already obtained a warrant as a result of their own independent investigation (Mot. Tr. 55-57, 62-63).

b. The Denver police investigation had been conducted by Detective Martinez, who learned the address of the laboratory and the identities of petitioners from an informant in January 1974. Detective Martinez had also surveilled the premises of the laboratory himself (Mot. Tr. 86-88). Upon learning of petitioners' arrest, Detective Martinez contacted his informant in an attempt to obtain sufficient information to allow the issuance of a warrant and its execution before petitioners could be released on bail (Mot. Tr. 93-94). The informant told Detective Martinez that he had seen LSD in a bench in the laboratory just the day before (Mot. Tr. 89-90). This information, together with the informant's previous information and the detective's averrment that he had smelled the odor of chemicals and seen containers for chemicals used in the production of unlawful drugs near the premises, provided the basis for a search warrant (see Affidavit for Search Warrant, R. Vol. VII, 46-A).[4]

c. After searching the laboratory and seizing 15 pounds of MDA, a DEA agent visited petitioners at the Denver jail. The agent advised Wunnicke of his constitutional rights, and told him what had

[4] The court of appeals found that probable cause for the search warrant was unrelated to the arrest of petitioners (Pet. App. A-4).

been found at the laboratory (Mot. Tr. 67-69). Wunnicke then told the agent, "I am glad it is over." He said he had gotten out of the business once, but that he got back into it as his way of rebelling against President Nixon. Wunnicke also implied that he had personally taken part in the process of making the MDA (Tr. 187-188). Wunnicke's statement did not incriminate Pieters.

2. Following the return of the indictment, petitioners moved to suppress the evidence seized pursuant to the search warrant and the statement made by Wunnicke. After an evidentiary hearing, the district court held that the arrest was legal and that Wunnicke's statement was voluntary (Mot. Tr. 212-213). However, because of questions raised by petitioners as to the existence of the informant, the judge determined to examine Detective Martinez *in camera*, without the presence of counsel, in order "to be as sure as we can" (Mot Tr. 208-209, 227-229).

At the *in camera* hearing, the judge learned the identity of the informant, questioned Detective Martinez about the informant, and had the court clerk verify through court records the reliability of the informant (App., *infra*, pp. 1a-2a).[5] Following the *in camera* examination, the court made the following findings (App., *infra*, pp. 2a-4a): that there was an informant, that he had proven reliable on at least two

[5] The transcript of the *in camera* proceeding and two memoranda regarding the investigation made by the court clerk (Vol. VIII, record on appeal) were sealed.

previous occasions, and that Detective Martinez had a reasonable basis for crediting the informant. Accordingly, the court held that the warrant was supported by probable cause, and denied the motion to suppress the fruits of the search (App., *infra*, pp. 3a-4a).[6]

ARGUMENT

1. Petitioners contend (Pet. 6-11) that the district court should have required the government to produce the informant to be questioned by defense counsel at the suppression hearing.

The decision whether the government should be required to produce an informant for examination by a defendant at a suppression hearing is to be made on a case-by-case basis and rests in the sound discretion of the trial court. *McCray* v. *Illinois*, 386 U.S. 300, 311 n. 11; *Roviaro* v. *United States*, 353 U.S. 53, 61. The trial court here specifically reserved ruling on the request to produce the informant until after the *in camera* examination of Detective Martinez, whose affidavit supported the warrant. At that examination the judge, the reporter and the witness were present (Mot. Tr. 226-227).[7] As a result

[6] On November 17, 1975, the district court, in a written opinion and order, denied petitioners' motion for a new trial alleging newly discovered evidence. We are lodging a copy of that opinion with the Clerk.

[7] In examining Detective Martinez, in chambers before a reporter but without counsel present, the district court followed the procedure contained in the proposed Federal Rules of Evidence which this Court submitted to Congress. Proposed Rule 510(c)(3) (see 56 F.R.D. 183, 255-256). The rule, as

of the hearing, the court found that the informant, whose whereabouts were then unknown,[8] did exist but it did not order that he appear in court.[9]

The claim that the court should have allowed defense counsel to participate in the *in camera* hearing is not well taken. The court had a simple factual question to resolve: whether there was an informant as stated in the affidavit. In these circumstances, the court's decision to protect the identity of the informant by excluding counsel from the hearing was a proper exercise of its discretion, as the cases cited by petitioner (Pet. 7-8) hold. *United States* v. *Anderson*, 509 F.2d 724, 729-730 (C.A. 9), certiorari denied, 420 U.S. 910; *United States* v. *Hurse*, 477 F.2d 31, 33 (C.A. 8) (affirming after remand, 453 F.2d 128), certiorari denied, 414 U.S. 908.

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well as the other proposed rules regarding privilege, were not adopted by Congress, which opted instead for a rule which would permit the courts to fashion a federal common law on the subject. See 2 Weinstein's *Evidence* 501-1 to 501-5, 510-50 to 510-67 (1975). The procedure followed by the district court also conforms to that prescribed by *A Model Code of Pre-Arraignment Procedure*, Section SS 290.4 (1975), which the American Law Institute recently adopted.

[8] The district court could have excused the government from producing him for that reason. Cf. *Little* v. *United States*, 490 F.2d 686, 686-687 (C.A. 8).

[9] The district court gave careful consideration to petitioners' polygraph evidence (Mot. Tr. 227-228). However, the polygraph operator admitted that the validity of the results was limited by the overly specific form of the questions asked (Mot. Tr. 201).

United States v. *Hurse*, *supra*, does not conflict with the instant case, since the court there only held that production of the informant for a suppression hearing was required on the particular facts of that case. 453 F.2d at 130-131. There the police made a warrantless entry for an arrest and search, probable cause for which was based solely upon information supplied by an informant. In the instant case, the facts were significantly different: Detective Martinez obtained a warrant, and the informant's information was corroborated by the detective's personal observations (Pet. App. A-4 to A-5). The other cases relied on by petitioners (Pet. 7-8) are inapposite because they involved situations in which an informant's testimony would have related to the defendants' guilt or innocence, rather than probable cause for a search.

2. Petitioners contend (Pet. 11-14) that Wunnicke's incriminating statement at the Denver jail to a DEA agent should have been suppressed as a fruit of the allegedly illegal stop of Pieters' vehicle.[10]

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[10] Wunnicke's statement did not incriminate Pieters, but only himself. Hence, even if that statement should have been suppressed, it would not affect Pieters' conviction. Moreover, it is questionable whether Pieters would even have standing to move to suppress Wunnicke's statement. See *United States* v. *Guana-Sanchez*, 484 F.2d 590, 595-596 (C.A. 7) (Pell, J., dissenting), certiorari dismissed, 420 U.S. 513.

Wunnicke's statement was not the only evidence connecting him to the laboratory and the manufacture of MDA. Wunnicke examined the premises prior to the execution of the lease (Tr. 11-12), he was seen inside the laboratory by the landlord sometime later (Tr. 18), he met with a chemical salesman at

As the court of appeals held (Pet. App. A-4), the stop of Pieters' vehicle was reasonable under *Terry* v. *Ohio*, 392 U.S. 1, which permits an officer to stop and question individuals in an investigation in circumstances not justifying an arrest. *United States* v. *Harflinger*, 436 F.2d 928, 930, 932-933 (C.A. 8), certiorari denied, 402 U.S. 973. Cf. *United States* v. *Brignoni-Ponce*, No. 74-114, decided June 30, 1975, slip op. 8; *Adams* v. *Williams*, 407 U.S. 143, 146. The Boulder County detectives had been investigating petitioners for several months before they dropped out of sight, and had recent information that they were manufacturing drugs (Mot. Tr. 18).

This was simply a stop for a routine investigation; there is no evidence that the detectives intended to detain petitioners beyond the momentary requirements of their mission. Cf. *Rios* v. *United States*, 364 U.S. 253, 262, on remand, 192 F. Supp. 888 (S.D. Cal.). Nor is there any suggestion of arbitrariness or that the detectives intended to harass petitioners.[11] It was only after the lawful stop that Pieters volunteered the information that led to his and Wunnicke's arrest.

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the laboratory to discuss the possible purchase of chemicals (Tr. 80-83), and, when arrested, he was carrying keys for the doors of the laboratory (Ex. 28; Tr. 45-47, 49, 166).

[11] The cases cited by petitioners (Pet. 12-13) are inapposite. *United States* v. *Nicholas*, 448 F.2d 622, 624-625 (C.A. 8), involved an investigatory stop made by the police on the assumption that "any black person driving an auto with out-of-state license plates might be engaged in criminal activity." The court pointed out that the police were not investigating any particular crime and had no information regarding the occupants of the car; in the instant case the police did have information that the occupants of the car were committing a particular crime. *United States* v. *Ward*, 488 F.2d 162, 167-170 (C.A. 9) (*en banc*), involved a general investigatory stop by FBI agents, using their siren, of a person whose address and place of employment were known. Furthermore, the court found it significant that the agents were not investigating the person they stopped, but other persons. In addition, the court recognized the broader investigative powers of local police (such as those who stopped petitioners in the instant case) than of federal agents. *Id.* at 169.

But, even assuming *arguendo* that the stop of Pieters' vehicle was unlawful, Wunnicke's statement is not automatically inadmissible under *Brown* v. *Illinois*, No. 73-6650, decided June 26, 1975, as petitioners suggest (Pet. 14-15).[12] In *Brown*, this Court held that the question whether an incriminating statement made after an illegal arrest is purged of the illegality and therefore admissible, must be decided on the facts of each case. Among the factors to be considered are not only whether *Miranda* warnings were given before the statement was made, but also "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, * * * and, particularly, the purpose and flagrancy of the official misconduct." Slip op. 12 (footnotes and citation omitted). Under these criteria, the statement made by Wunnicke to the DEA agent was "suf-

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[12] Since the court below held the stop of the vehicle lawful, it did not have to reach the question presented in *Brown*.

ficiently an act of free will to purge [any] primary taint." *Wong Sun* v. *United States*, 371 U.S. 471, 486.

Not only had *Miranda* warnings been given to petitioners by the local police, but the DEA agent who took the statement warned Wunnicke of his constitutional rights just before questioning him (Mot. Tr. 68-69). Moreover, Wunnicke himself testified that he understood his rights, and that no threat or coercion was used to induce the statement (Mot. Tr. 153-155). Wunnicke was being questioned not by the police who had made the stop, but by a federal DEA agent, who had just participated in the search of petitioners' laboratory, where a large amount of MDA had been found. The obvious impetus for the statement was Wunnicke's realization that the laboratory had been discovered. Accordingly, under all the circumstances, Wunnicke's statement was not a product of the stop of Pieters' vehicle. Cf. *Westover* v. *United States*, 384 U.S. 494, 496.[13]

[13] Nor was it the product of an illegal detention of Wunnicke, as petitioners suggest (Pet. 14). Although Pieters claims he told the police that Wunnicke did not know about the pills, Pieters also told them he had not known of them either (Mot. Tr. 118, 138). Therefore, the possibility that Wunnicke had put the pills in the brief case without telling Pieters could not be discounted.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1975.

APPENDIX

ORAL OPINION OF THE HONORABLE ALFRED A. ARRAJ

(April 5, 1974)

(Transcript of Motion to Suppress Hearing, pages 232-233, 235-237; Volume VI of Record on Appeal)

* * * * *

[Mot. Tr. 232] Subsequent to our last hearing, as was referred to in court and suggested by I believe both counsel, the Court had an in camera interrogation of Detective Mike A. Martinez, who had signed the affidavit for the search warrant, and evidence was taken from him at that time. Those present were Mr. Martinez, the court reporter and myself. No other persons were present. That interrogation was made in my chambers.

Additionally, after the interrogation of the officer and as a result of his answers to certain questions which I propounded, I caused further investigation to be made by having the clerk of this court, not a deputy, but the clerk himself check certain records in the county court or the office of the clerk of the county court, City and County of Denver, and a memorandum of what he found as a result of my request was made by him and signed by him. Well, there are two memoranda, one referring to one of the incidents mentioned by Mr. Martinez in his affidavit and the other referring to a different incident [Mot. Tr. 233] mentioned by Mr. Martinez.

Now, the incidents themselves weren't mentioned, but he referred to previous occasions when he had obtained information from the informer and that memorandum or report by the clerk of this court was also typed and signed, and a transcript of the questions asked Mr. Martinez and his answers, certified by the court reporter, and those two memoranda that the clerk prepared as a result of his checking court records, county court records over at the City and County of Denver, will be sealed and made a part of the record in this case. They will not be available to counsel or to the public. They will only be available either by special order of this Court or in the event of an order by a higher court.

* * * * *

[Mot. Tr. 235] In making this ruling, I will tell you some more or I will tell you actually some of the things that I ascertained from my interrogation of the police officer, Mr. Martinez. I obtained the name of the informer. His present whereabouts I did not obtain. They were unknown to the police officer. I obtained the actual location of an edifice—I don't recall whether it was a residence or some other type of structure—where the police officer had been told by the informer that he would likely find illicit drugs, that that information was followed up and certain persons were arrested as a result of the information which the police obtained. The cases were prosecuted by the district attorney in the City and County of Denver, and a second incident that the

informant related to the police officer was [Mot. Tr. 236] also followed up and some persons were arrested, some material, allegedly illicit drugs, were obtained, and the matter turned over to the district attorney and cases filed by the district attorney, criminal cases.

As a result of that information, I concluded that Mr. Martinez had reasonable cause to believe the informant, because he had proven reliable in two, at least two, other instances, both of which were verified by the Court through its clerk checking the records and the documentary material that I earlier referred to.

So, I find that the affiant had probable cause to execute the affidavit and there was probable cause shown in the affidavit to support the search warrant which was eventually issued by Judge Mueller and was executed.

I also find that there was no illegal entry into 1220 South Jason Street, that on the date in qusetion, namely, January 16, 1974, the front door was unlocked by the testimony of the defendants themselves in this court, that this was not the home of the defendants. They did not live there. It was a building in which some enterprise was being engaged in by the defendants, but it had some sort of advertising signs I believe with the words Solar Metallurgicals on it, that the public were invited to go into this building because the front door was open. It was unlocked. In no sense was it a private dwelling or

private residence or private business even, and the motion to quash the [Mot. Tr. 237] evidence or to suppress the evidence obtained through the execution of the search warrant is denied.

Now, as to the material which I told you I had a transcript of, the in camera interrogation, and the other two documents, they will be sealed, but they will not be in the court file. They will be in the clerk's vault, the clerk of our court's vault.

* * * * *

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